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No. 84-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether state courts lack subject matter jurisdiction to adjudicate claims based upon alleged breaches of duty by fiduciaries of an employee benefit plan covered by ERISA where such claims are asserted as third-party claims for contribution and/or indemnity.

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BRIEF FOR RESPONDENTS IN OPPOSITION

RELEVANT STATUTES

The relevant statutes, in addition to those cited by petitioners, are as follows:

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1):

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

ERISA § 409(a), 29 U.S.C. § 1109(a):

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

SUMMARY OF ARGUMENT

This case is inappropriate for review on writ of certiorari. No "special and important reasons" for granting review are presented nor does the decision of the New York State Court of Appeals conflict with the decisions of this Court, federal courts of appeals, or of other state courts of last resort.

To the contrary, the decision of the New York Court of Appeals sought to be reviewed is entirely consistent with

ERISA's legislative history and with the decisions of this and other courts which have firmly established that state courts lack subject matter jurisdiction to adjudicate claims of breach of fiduciary duty against trustees of ERISA plans.

In light of the overwhelming authorities uniformly holding that state courts lack subject matter jurisdiction over such claims, the issue raised herein can hardly be considered either unsettled or novel. What is unprecedented, however, are petitioners' attempts to alter the well-settled jurisdictional bounds of the state court by inviting such court to evaluate the conduct of ERISA fiduciaries in the context of third-party claims for contribution and/or indemnity.

The Petition fails to address the numerous decisions recognizing ERISA's broad pre-emption of state law and, indeed, does not even mention this Court's decision in *Alessi* v. *Raybestos - Manhattan, Inc.*, 451 U.S. 504 (1981). Nor do petitioners substantiate their contention that claims for contribution and indemnity come within any of the recognized narrow exceptions to ERISA's pre-emption. Instead, petitioners advance a series of arguments, none of which warrant departure from the well-established principles already articulated by this Court.

ARGUMENT

I. PETITIONERS FAIL TO SATISFY THE STANDARDS GOVERNING REVIEW ON CERTIORARI

Rule 17.1 of the Rules of the Supreme Court of the United States states: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." In the instant case there are no reasons—special and important or otherwise—for granting the writ.

Rule 17.1(b) indicates that certiorari may be granted "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last

resort or of a federal court of appeals." No such conflict exists herein nor do petitioners attempt to establish the existence of any such conflict.

Furthermore, the New York Court of Appeals has not "decided an important question of federal law which has not been . . . settled by this Court, or . . . in a way in conflict with the applicable decisions of this Court." Rule 17.1(c).

To the contrary, the decision of the New York Court of Appeals is consistent with well-established principles of federal pre-emption under ERISA. Reaffirmation of those principles by this Court is, we submit, unnecessary.

II. STATE COURTS LACK SUBJECT MATTER JURISDICTION TO ADJUDICATE CLAIMS BASED ON ALLEGED BREACHES OF DUTY BY TRUSTEES OF AN EMPLOYEE BENEFIT PLAN COVERED BY ERISA

The Congressional findings and declaration of policy codified at 29 U.S.C. § 1001 conclusively establish that Congress recognized that there was a serious national problem with respect to employee benefit plans and that a *uniform* and manageable solution was required. In formulating such a solution, Congress declared it to be its policy

> . . . to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, *by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*

29 U.S.C. § 1001(b) (emphasis added).

The ERISA legislation enacted by Congress in response to its findings and to fulfill its policy declarations has recently been

described by this Court as a " 'comprehensive and reticulated statute' which Congress adopted after careful study of private retirement . . . plans." *Alessi* v. *Raybestos - Manhattan, Inc.*, 451 U.S. 504 (1981), quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S 359, 361, *reh'g denied*, 448 U.S. 908 (1980). As noted by the Court in *Alessi*, "[t]o ensure that employee pension expectations are not defeated, [ERISA establishes rules] for employee participation, §§ 1051-1061; funding standards to increase solvency of pension plans §§ 1081-1085; *fiduciary standards for plan managers, §§ 1101-1114*; and an insurance program in case of plan termination, §§ 1341-1348 . . ." 451 U.S. at 510 n.5 (emphasis added). Similarly, this Court in *Shaw* v. *Delta Air Lines, Inc.*, ____ U.S. ____, 103 S. Ct. 2890, 2896-7 (1983), noted that ERISA "sets various uniform standards, including rules concerning . . . fiduciary responsibility, for both pension and welfare plans."

The broad federal pre-emption of state regulation of employee benefit plans which are covered by ERISA has been uniformly and widely accepted. *Shaw* v. *Delta Air Lines, Inc.*, *supra*, 103 S. Ct. at 2900; *Alessi* v. *Raybestos - Manhattan, Inc.*, *supra*, 451 U.S. at 510; *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, *supra*, 446 U.S. at 361; *Malone* v. *White Motor Corp.*, 435 U.S. 497, 512 (1978) (plurality opinion), *aff'd*, 444 U.S. 911 (1979); *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danziger*, 709 F.2d 815, 830 (3d Cir. 1983), *rev'd on other grounds*, 52 U.S.L.W. 5042 (1984); *Stone & Webster Engineering Corp.* v. *Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982); *Marshall* v. *Snyder*, 430 F. Supp. 1224, 1230-31 (E.D.N.Y. 1977), *aff'd in part and remanded*, 572 F.2d 894 (2d Cir. 1978); *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502, 504 n.4 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) ("Congress unmistakably intended ERISA broadly to pre-empt state regulations of ERISA regulated employee benefit plans"); *Morrissey* v. *Curran*, 567 F.2d 546, 549 (2d Cir. 1977); *Marshall* v. *Chase Manhattan Bank (Na-*

tional Association), 558 F.2d 680, 683 (2d Cir. 1977); *Azzaro* v. *Harnett*, 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 93 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977); *Guthrie* v. *Dow Chemical Co.*, 445 F. Supp. 311, 313-14 (S.D. Texas 1978) (emphasis added) (ERISA indicates "a clear intent on behalf of the Congress to pre-empt the entire area of regulation of all covered pension plans. . . Congress intended to reserve a federal authority the *sole power* to regulate the field of covered employee benefit plans"); *Cate* v. *Blue Cross & Blue Shield of Alabama*, 434 F. Supp. 1187, 1190 (E.D. Tenn. 1977) ("Having established a new body of federal rights and obligations, Congress added to the jurisdiction of the federal courts in order to further the legislative purpose. For this reason, it pre-empted state laws insofar as they related to employee benefit plans"); *Bell* v. *Employee Security Benefit Association*, 437 F. Supp. 382, 387 (D. Kan. 1977) ("we conclude that federal pre-emption in the area of pensions and other employee benefit programs is virtually total"); *Kerbrow* v. *Kerbrow*, 421 F. Supp. 1253, 1260 (N.D. Texas 1976) ("Congress intended the Act to supersede any and all state laws regulating employee benefit plans").

Furthermore, an examination of the plain language of ERISA and the legislative history underlying enactment of ERISA conclusively "shows that Congress intended *absolute preemption of the field* of employee benefit plans." *Azzaro* v. *Harnett*, *supra*, 414 F. Supp. at 474 (emphasis added).

ERISA § 514, 29 U.S.C. § 1144 provides in relevant part:

> (a) . . . [T]he provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .
>
> * * *
>
> (c) For purposes of this section:

> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .

This Court has recently stated that "the breadth of § 514(a)'s pre-emptive reach is apparent from that section's language." *Shaw* v. *Delta Air Lines, Inc.*, *supra*, 103 S. Ct. at 2899-2900.

As discussed by the court in *Bell* v. *Employee Security Benefit Association*, *supra*:

> . . . *we believe that the legislative history indicates that this wording was meant to convey just as broad a concept of preemption as appears on the face of the statute.*
>
> 'The original House and Senate versions of ERISA provided for preemption of state law. But the broader preemption provision which was eventually incorporated into ERISA was developed in conference committee.
>
> 'The joint explanatory statement of the conference committee indicated just how broad the preemption provision was meant to be:
>
> > Preemption of State Laws (Sec. 514 of the bill)
> >
> > Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce. . . .
>
> 'In introducing the conference report, Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, made the following statement:
>
> > It should be stressed that with the narrow exceptions specified in the bill, *the substantive and enforcement provisions of the conference substitute are intended to preempt the field of Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee*

> *benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.* [1974] U.S. Code Cong. & Admin. News, pp. 5188-89.

'Senator Javits, ranking minority member of the Senate Committee on Labor and Welfare, explained the reasoning of the conference committee in broadening the preemption provision:

> Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, *the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.* The conferees—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made. 120 Cong. Rec. 29942 (1974).

'The importance of the preemption provision was highlighted by Representative John Dent, Chairman of the Subcommittee on Labor of the House Committee on Labor and Education:

> *Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans.* With the preemption of the field, we round out the protection afforded participants by *eliminating the threat of conflicting and inconsistent State and local regulation.*
>
> *The conferees*, with the narrow exceptions specifically enumerated, *applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof*—including any professional society or association operating under color of law—*which would affect any employee benefit plan* as described in section 4(a) and not exempt under section 4(b).

In light of this legislative history, we conclude that federal preemption in the area of pensions and other employee benefit programs is virtually total. 437 F. Supp. at 386-88 (emphasis added).

In *Azzaro* v. *Harnett*, *supra*, the Court added:

> Preemption of the field was intended to provide for uniform regulation of employee benefit plans. The Report of the House Education and Labor Committee states:
>
> > 'Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. *Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law* in

> the areas of vesting, funding, insurance and portability standards, *for evaluation of fiduciary conduct*, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports. [1974] U.S. Code Cong. & Admin. News p. 4655.'

414 F. Supp. at 474 (emphasis added).

In *Hewlett-Packard Co.* v. *Barnes*, *supra*, the Court, after thorough analysis of the legislative history underlying ERISA, concluded (425 F. Supp. at 1300):

> Overall, the legislative history reveals both that Congress carefully considered the question of preemption, including the feasibility of enacting a more limited preemption provision, and that Congress ultimately enacted Section 514(a) with the express purpose of summarily preempting state regulation of ERISA-covered employee benefit plans. That the statute, standing alone or buttressed by its legislative history, was intended to supersede state regulation of benefit plans such as plaintiffs' is indisputable.

Consistent with the federal policies hereinabove discussed, it is well-established that, with a limited exception not pertinent herein,[1] state courts are absolutely precluded from adjudicating claims relating to employee benefit plans which are regulated by ERISA. *See, e.g., Delta Air Lines, Inc.* v. *Kramarsky*, 666 F.2d 21 (2d Cir. 1981), *aff'd in part, and vacated in part sub. nom. Shaw* v. *Delta Air Lines, Inc.*, *supra*; *Morrissey* v. *Curran*, *supra*; *Marshall* v. *Chase Manhattan Bank (National Association)*, *supra*.

The reasoning behind state court pre-emption was stated by the Second Circuit in *Marshall* v. *Chase Manhattan Bank (N.A.)*, *supra*, as follows:

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1 ERISA § 502(e)(1) confers concurrent jurisdiction on state and federal courts only over actions brought under ERISA 502(a)(1)(B)—civil actions by "a participant or beneficiary" to recover benefits or to enforce or clarify his rights under the terms of a plan.

> . . . surely the interpretation of a federal statute providing for exclusive jurisdiction in the federal courts presents a federal question to be decided by that court and not the state tribunal . . . The superior federal interest sought to be vindicated here is clear from §§ 502 and 514 of the Act as well as its legislative history which establish the congressional intent that the United States regulate the field of employee benefit plans eliminating the threat of conflicting and inconsistent local regulation.

558 F.2d at 683.

The absolute preclusion of state court adjudication of any claim governed by the provisions of ERISA applies with full force to claims such as those asserted in the third-party complaint alleging breach of duty by the fiduciaries of an employee benefit plan. Such claims are expressly covered by ERISA. ERISA § 404(a), 29 U.S.C. § 1104(a) provides in relevant part:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

ERISA § 409(a), 29 U.S.C. § 1109(a) imposes civil liability upon trustees of an employee benefit plan for breach of the duties set forth in ERISA § 404(a).

Both federal and state courts have uniformly agreed that federal courts have exclusive jurisdiction to adjudicate such claims for breach of duty by a fiduciary. *See Central States, Etc.* v. *Old Security Life Insurance Co.*, 600 F.2d 671, 676 (7th Cir. 1979) ("[t]hat the federal courts have exclusive jurisdiction over ERISA claims for breach of fiduciary duty is settled"); *Morrissey* v. *Curran*, *supra*, 567 F.2d at 549 ("under the exclusive jurisdictional provisions of ERISA, that claim [breach of fiduciary duty] could be made nowhere else"); *O'Neil, et al.* v. *Marriott Corp., et al.*, 538 F. Supp. 1026, 1034 (D.Md. 1982); *Hopkins, et al.* v. *FMC Corp., et al.*, 535 F. Supp. 235 (W.D.N.C. 1982); *Wong* v. *Bacon*, 445 F. Supp. 1177, 1185, 1187 (N.D. Cal. 1977) ("Congress gave federal courts exclusive jurisdiction over claims involving breach of fiduciary duties. . . ."); *Young* v. *Sheet Metal Workers' International Association Production Workers Welfare Fund (New York), et al.*, 112 Misc. 2d 692, 447 N.Y.S.2d 798 (Sup. Ct. Nassau Co. 1981); *Zink* v. *Heiser*, 109 Misc. 2d 354, 363, 438 N.Y.S.2d 209 (Sup. Ct. Queens Co. 1981); *Hunacek* v. *Union Welfare Fund Local 202*, 100 Misc. 2d 740, 743, 746, 420 N.Y.S.2d 156 (Sup. Ct. Queens Co. 1979); *Smith* v. *Crowder Jr. Company*, 280 Pa. Super. 626, 421 A.2d 1107 (1980); *Goldberg* v. *Caplan*, 277 Pa. Super. 47, 419 A.2d 653, 657 (1980) ("Were state laws (and actions) not preempted, trustees would be subject to the threat of conflicting and inconsistent regulation by state and federal authorities"). As the court stated in *Wong* v. *Bacon*, *supra*:

> The appropriateness of a federal, as distinguished from state, forum is signalled by Congress' decision in § 502(e)(1) to give federal courts exclusive jurisidiction over claims involving breach of fiduciary duties. Congress wanted federal courts to elaborate the broad fiduciary standards laid down in ERISA. . . .

445 F. Supp. at 1185-6 (citations and footnote omitted).

Turning to the facts and allegations in this case, there is no dispute that the Fund involved herein constitutes an employee welfare benefit plan within the meaning of § 3(1) of ERISA, 29

U.S.C. § 1002(1),[2] and is therefore subject to regulation under that Act. There is also no dispute that the third-party defendant trustees are fiduciaries within the meaning of section 3 of ERISA.[3]

As is clear from a review of the third-party complaint the gravamen of the claims asserted are alleged breaches of duty by the third-party defendant trustees.

In the instant case, the defalcations were allegedly made by the Fund's administrator, Jerome Simon, directly and exclusively from Fund assets. The claims against the trustees are based on alleged breaches of duties of care, clearly the type of claims within the exclusive purview of ERISA. The First Cause of Action in the third-party complaint alleges breaches by the trustees of various alleged duties including, *inter alia*, duties of management, investment and to oversee, review and participate in the financial affairs of the Fund. And the Second

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2 29 U.S.C. § 1002(1) provides:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

3 ERISA § 3(21), 29 U.S.C. § 1002(21) provides in relevant part:

> (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Cause of Action explicitly alleges that "Third Party Defendant (Trustees) owed a *fiduciary* duty to the Plaintiff . . . in their capacity as Trustees" (emphasis added).

Thus, it is clear that the third-party claims against the trustees go to the heart of ERISA's fiduciary provisions and intrude upon an area expressly addressed by ERISA. In this respect the instant case stands in marked contrast to the cases cited by petitioners in which state laws were held not pre-empted by ERISA (Petition, pp. 9-10, fn. 1).[4]

Similarly misplaced is petitioner's reliance (Petition, p. 11) on this Court's decision in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, ____ U.S. ____, 103 S. Ct. 2841 (1983) and, in particular, on the Court's observation in that case that ERISA § 514

> "makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans. With important, but express limitations, it states that 'nothing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking, or securities.' " 103 S. Ct at 2855.

By contrast, claims seeking contribution or indemnity do not come within any of the "narrow exceptions" to pre-emption under § 514(a). *Cf.*, *Shaw* v. *Delta Air Lines, Inc.*, *supra*, 103 S. Ct. at 2902.

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4 Among the authorities cited by petitioners are cases arising in a domestic relations context, despite the well-settled principle that where state domestic relations law is involved, a finding of federal pre-emption must be supported by a higher standard of proof, *McCarty* v. *McCarty*, 453 U.S. 210, 220 (1981); *Stone & Webster Engineering Corp.* v. *Ilsley*, *supra*, 690 F.2d at 329. Petitioners also rely on pre-*Alessi* cases wherein Courts based their decisions on the finding that the state laws involved had only an *indirect* effect on ERISA plans. *See*, *e.g.*, *Provience* v. *Valley Clerks Trust Fund*, 509 F. Supp. 388 (E.D. Cal. 1981). However, this Court in *Alessi* v. *Raybestos - Manhattan, Inc.*, held that it was immaterial that state law intrudes *indirectly*, rather than *directly*, into an area of exclusive federal concern. "ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern." 451 U.S. at 525.

Petitioners next argue, without a shred of support that ERISA "implicitly makes clear" that third parties can bring claims in state court relating to breaches of fiduciary duties. While petitioners rely on ERISA §§ 410 and 412 (relating to insurance and bonding of fiduciaries), there is nothing in either of those sections which supports petitioners' bald assertion that an insurer can sue a trustee for breach of fiduciary duty in state court (Petition, p. 13). Moreover, even if such a suit could be brought in state court, petitioners overlook the explicit exception from pre-emption in ERISA § 514 for state laws relating to insurance. Again, there are no exceptions, explicit or otherwise, for actions seeking contribution or indemnity.

Petitioners suggest that if claims against trustees cannot be asserted in state court then the purposes of New York's contribution law will be defeated (Petition, p. 14). However, New York's highest court has already rejected this argument and, we respectfully submit, there is no need for further review of this issue by this Court. Furthermore, the New York Court of Appeals obviously did not invalidate New York's contribtuion law in the face of ERISA's pre-emption. Rather, the Court merely recognized that the subject matter jurisdictional limitations of the state courts may not be ignored simply because claims of breach of duty against fiduciaries are couched as claims for contribution and indemnity.

Petitioners also err in urging that the decision of the New York Court of Appeals would allow the trustees to "escape responsibility" and "is contrary to the purpose and intent of ERISA" (Petition, p. 15). First, the trustees have not been permitted to "escape responsibility," but rather are subject to suit in federal court in accordance with the provisions of ERISA § 502.[5] Second, the decision of the New York Court of Appeals is entirely consistent with the purpose and intent of ERISA to insure uniform standards for enforcement of fiduciary obligations.

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5 Significantly, petitioners fail to disclose that simultaneously with the filing of the instant Petition with this Court, they have also petitioned for removal of the entire case to the United States District Court for the Southern District of New York.

By contrast, to permit petitioners to assert their claims against the trustees in state court would lead to anomalous and unprecedented results. On one hand, state courts are absolutely precluded from interpreting and applying ERISA's fiduciary standards to the claims against the trustees and we are unaware of any state court which has ever done so. On the other hand, for a state court to apply state law standards to determine whether ERISA trustees breached their fiduciary duties would run afoul of the explicit pre-emption provisions of ERISA § 514, 29 U.S.C. § 1144, and would create the conflicting and inconsistent state regulation of ERISA plan fiduciaries that Congress strived to avoid.

Thus, it is clear that it is *petitioners' position* which is contrary to the purpose and intent of ERISA. Indeed, if the conduct of trustees is to be judged by different rules depending upon whether the claims against them are brought as primary claims or as third-party claims for contribution, the uniformity sought to be achieved by Congress in enacting ERISA will be totally eviscerated.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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